IN THE

Supreme Court of the United States

October Term, 1971

No. 71-330

COUNTY ASPHALT, INC.,

Petitioner,

v.

THE LEWIS WELDING & ENGINEERING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Opinion Below

The opinion of the Court of Appeals is reported at 444 F.2d 372 and also appears in Appendix A to the Petition.*

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). It is the position of respondent

* Appendix A to the Petition ("Pet. App. A") includes not only the Court of Appeals' opinion but also the orders denying rehearing, the opinions of the Trial Court relating to pre-judgment interest and the exclusion of consequential damages, the original unamended judgment, and the opinion of District Judge Frankel denying respondent's motion for partial summary judgment.

that since the purported appeal to the Court of Appeals was premature, the Court of Appeals lacked jurisdiction and that therefore there is no valid action by that Court to be reviewed by this Court.

The action was tried before District Judge Croake and a jury in the District Court for the Southern District of New York. The issues were presented to the jury in the form of a general verdict accompanied by written interrogatories pursuant to Rule 49(b) of the Rules of Civil Procedure. Based upon the jury's verdict, judgment was entered on November 9, 1970, in favor of respondent in the sum of $226,000 (A.* 177a-182a). Within ten days thereafter both parties filed motions to amend the judgment. Petitioner's motion was to reduce the judgment from $226,000 to $66,000 or for a new trial, based upon the claim that there was an irreconcilable conflict between the jury's answers to the written interrogatories and its general verdict. Respondent moved to amend the judgment to add pre-judgment interest.

On November 19, 1970, while both motions were pending, petitioner filed its notice of appeal to the Court of Appeals. This was the only notice of appeal ever served or filed.

On November 30, 1970, the District Court denied petitioner's motion and granted respondent's motion. On the same day the judgment was amended to include pre-judgment interest in the total amount of approximately $71,000. No appeal was taken from the order of November 30, 1970, or from the judgment as so amended.**

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* "A." refers to the Appendix filed in the Court of Appeals.

** These undisputed facts are set forth in the affidavits of Edward E. Rigney, Esq. in support of respondent's motion to dismiss the appeal and its motion for a rehearing in the Court of Appeals.

It is well settled that a timely motion to amend a judgment with respect to matters of substance, and not mere form, deprives the judgment of that finality which is essential to appealability. *Aspen Mining & Smelting Co.* v. *Billings,* 150 U.S. 31, 36 (1893); *Leishman* v. *Associated Wholesale Elec. Co.,* 318 U.S. 203, 205 (1943). The rationale of these cases is clear: until the Trial Court acts on such a motion there is no final judgment within the meaning of 28 U.S.C. § 1291 from which an appeal can be taken. *Zimmern* v. *United States,* 298 U.S. 167, 169-170 (1936). The appeal purportedly taken from the judgment of November 9, 1970, while motions to amend with respect to substantial matters were pending was therefore a nullity and conferred no jurisdiction on the Court of Appeals. *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 177 (1944); *Stevens* v. *Turner,* 222 F.2d 352 (7th Cir. 1955); *Healy* v. *Pennsylvania R.R.,* 181 F.2d 934 (3d Cir. 1950); *Green* v. *Reading Co.,* 180 F.2d 149 (3d Cir. 1950).

In *Crescent Amusement* judgment was entered and thereafter motions were made to amend the findings. While these motions were pending the government filed its first appeal, No. 17. Later the District Court ruled on the motions to amend its findings and thereafter the government filed its second appeal, No. 18. While this Court held that the second appeal was proper, it dismissed the first appeal, No. 17, stating (323 U.S. at 177):

> "The motion to amend the findings tolled the time to appeal if it was not addressed to 'mere matters of form but raised questions of substance,' e.g., if it sought a 'reconsideration of certain basic findings of fact and the alteration of the conclusions of the court.' *Leishman* v. *Associated Electric Co.,* 318 U.S. 203, 205. An examination of the motion makes plain that

matters of substance were raised. The appeal in No. 17 was accordingly premature. *Zimmern* v. *United States*, 298 U.S. 167."

Since petitioner's only notice of appeal was "premature (and therefore a nullity)" (323 U.S. at 177), the Court of Appeals lacked jurisdiction to entertain the appeal.

Respondent appropriately moved to dismiss the appeal in the Court of Appeals but that Court denied the motion on the call of its motion calendar. The Court also denied respondent's motion for a rehearing on its motion to dismiss.

In the Court of Appeals petitioner attempted to rely on the decision of this Court in *Foman* v. *Davis*, 371 U.S. 178 (1962). In that case two appeals were involved. The District Court there had entered judgment on December 19, 1960, dismissing petitioner's complaint. On December 20, 1960, petitioner filed motions to vacate the judgment dismissing the complaint and to amend the complaint to assert a new theory. On January 17, 1961, while such motions were pending, petitioner filed a notice of appeal from the judgment of December 19, 1960. Six days later, on January 23, 1961, petitioner's motions were denied, and on January 26, 1961, petitioner filed a second notice of appeal from the order denying its motions. The Court of Appeals for the First Circuit properly treated the first appeal as being premature and therefore of no effect. It also held, however, that the second notice of appeal was ineffective because it failed to specify that the appeal was being taken from the judgment dismissing the complaint as well as the order denying the motions. It was on the basis of what was found by this Court to be misplaced reliance on this merely formal defect that this Court held that even though

the first notice was premature, the second notice of appeal conferred jurisdiction on the Court of Appeals below. It is respondent's position that *Foman* v. *Davis* has no application to the instant case since here no appeal was taken from the amended judgment or from the order of the District Court denying petitioner's motion and granting respondent's motion to amend the judgment.

For this reason alone, respondent respectfully submits, the petition for a writ of certiorari should be denied.

Questions Presented

1. Whether the Court of Appeals had jurisdiction to entertain the purported appeal from the amended judgment entered in the District Court.

2. Whether the fact that the jury found that respondent had substantially performed each contract and was not negligent renders moot petitioner's contentions concerning the dismissal by the District Court of its claim for consequential damages. Whether, in any event, petitioner's contentions on this point have any validity.

3. Whether there was any irreconcilable conflict between the jury's answers to the written interrogatories and its general verdict in favor of respondent.

Statement of the Case

In December 1964 petitioner and respondent executed two conditional sales contracts relating to two asphalt plants to be erected by respondent at Tarrytown and West Nyack, New York for the total price of $460,000 plus two small

old asphalt plants, valued at about $24,000 apiece, which were traded in to respondent (V.* 1-21; A. 67a). Petitioner in December 1965 brought this action claiming that respondent breached the contracts of conditional sale and was guilty of breach of warranty and negligence. It demanded damages (including a claimed loss of profits) in excess of $2 million and specific performance (A. 6a-16a). The two contracts covering the transaction contain identical clauses relating to the warranty, the exclusive remedy of replacement and repair, and exclusion of liability for consequential damages (V. 17). Each provided that title was to remain in respondent until the full purchase price was paid to respondent in cash (V. 17). Petitioner made only two down payments on the purchase price and at the trial it was stipulated that the unpaid balance of the purchase price (including the price of certain materials supplied by respondent for two other existing plants of petitioner) was $385,229.25 (Pet. App. A 20a).

It was agreed that the Tarrytown plant would be first erected and that the new West Nyack plant would be placed in operation later. In the meanwhile, petitioner was permitted to use the old West Nyack plant which had been conveyed to respondent as part of the total purchase price (Pet. App. A 21a).

Pursuant to a separate agreement between the parties, petitioner hired union labor to perform the construction work on the understanding that the labor costs would be "backcharged" to respondent (Pet. App. A 3a).

There were delays in starting the construction of the new Tarrytown plant, occasioned in part by soil problems encountered by petitioner in preparing the plant site for

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* "V." refers to the Exhibit Volume in the Court of Appeals.

a proper foundation and in part by unavoidable shipment delays of material ordered by respondent from outside suppliers (PX* 9; T.** 474, 514). In April 1965 the Tarrytown plant was operable by pushbutton control and, by the latter part of June automation, required by New York on State contracts, was installed, and approved by the New York State Department of Public Works on June 30, 1965 (T. 1860, 2098; DX† G, PX 49).

There are a number of misleading statements in the Petition regarding the facts developed at the trial. For example, petitioner claims that it was "entirely dependent on Lewis' [respondent's] timely performance to begin asphalt production on April 1, 1965 in Tarrytown for several major New York State road construction contracts in the area" (Petition, p. 5). Neither contract called for production to begin at any particular time. Secondly there is no evidence that there were any New York State road construction contracts which would have required production at the Tarrytown plant by April 1, 1965. In point of fact the president of petitioner testified that petitioner did not produce asphalt for the State until May of each year (T. 38). Similarly there was no evidence that the "backcharge" agreement was made in order to allow petitioner to complete erection by April 1, 1965, as petitioner claims (Petition, p. 5). Again on page 6, the Petition states that the plant breakdowns in early 1965 drove its customers "including large companies holding New York State highway construction contracts, to purchase asphalt

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* "PX" refers to Plaintiff's Exhibits introduced at the trial.

** "T." refers to the Transcript of the testimony at the trial.

† "DX" refers to Defendant's Exhibits introduced at the trial.

from other producers". There was no such evidence at the trial. On page 7 of the Petition, petitioner claims that on respondent's pre-trial motion for partial summary judgment it "demonstrated that it lost profits in excess of $450,000". This, of course, was based on self-serving affidavits which formed no part of the record at the trial. In depositions taken by respondent of petitioner's officers and employees it was established that the claims of loss of profits were grossly exaggerated if not completely unfounded.

Various problems were encountered in the "shakedown" period at Tarrytown but these for the most part were quickly corrected by respondent. A few additional repairs and part replacements appeared to be desirable in late 1965 and respondent, without conceding that these came within its warranty, expressed its willingness to supply the additional work and parts if petitioner made a further down payment since petitioner was in substantial default as to the instalment payments required by the contracts. Petitioner's response was to file this suit in December 1965 claiming damages totaling over $2 million (T. 1064, 1082-1083).

During 1965 petitioner complained of the delays and difficulties encountered in the construction of both plants and in the Fall of that year, for the first time, claimed that the plants could not produce 300 tons per hour of asphalt, the rated capacity of each plant as set forth in the contracts (T. 1063-1071). At the trial, however, many "batch" or production tickets were introduced into evidence showing that on numerous occasions the new plants produced asphalt at a rate in excess of 300 tons per hour (DXs AV, AW, AX, AZ). This documentary evidence belies the claim

of petitioner on page 7 of the Petition that it "discovered that each plant could produce only 180 to 210 tons per hour". Some trouble was found to exist in connection with certain material required under a new formula adopted by the State of New York, but this problem was common to many asphalt plants operating in that State (T. 1071, 1207-1208, 2184, 2523).

Petitioner's claims with respect to the alleged defects in the two plants were completely negated by the evidence adduced by respondent relating to loans totaling $600,000 that petitioner obtained on the two new plants from Irving Trust Company, in contravention of the conditional sales contracts which reserved title to the plants in respondent and prohibited any liens being placed thereon (DXs AB, AD, AG, CN; T. 2456). This, of course, amounted to a conversion of the plants, as the jury found (A. 181a). The documentary evidence established that in so doing, petitioner in effect assured the trust company that each of the plants, at the time of the respective loans (the latter of which was obtained only 7 days before this suit was commenced), met all specifications of the contracts (DXs CQ, CR). Furthermore, uncontradicted evidence introduced by respondent showed that the two plants were and still are insured by petitioner for a total of $725,000 and capitalized, for income tax purposes, at over $600,000 (T. 2329, 2349, 2370-2371). The jury found that respondent had substantially performed the contracts even though it also found that respondent had not repaired or replaced "every" defective or non-conforming part. It also determined that respondent was not guilty of negligence (A. 178a-180a). It awarded $160,000 to petitioner for its "backcharges", which included items of repair in addition to construction costs (Pet. App. A 9a, n. 5), and, deducting this amount

from the stipulated amount of the unpaid purchase price (approximately $386,000 in round numbers), reached a general verdict in respondent's favor of $226,000 (A. 178a, 182a).* Judgment was entered for this amount which was later amended, on respondent's motion, to include an additional sum of approximately $71,000 representing pre-judgment interest (*supra*, p. 2).

Argument

Petitioner incorrectly assumes that this Court has jurisdiction to review the decision of the Court of Appeals. Since, as we have shown, the appeal from the District Court was premature and therefore a nullity, the Court of Appeals had no jurisdiction and its proceedings should be disregarded. The amended judgment in the District Court, from which no appeal was taken, stands unchallenged. The Petition therefore should be dismissed.

Aside from this jurisdictional bar, however, the Petition states no ground upon which this Court should assume jurisdiction. No meritorious federal question is raised and no conflict in the decisions of the Courts of Appeal is claimed. On the contrary, the questions of fact involved were properly determined in the District Court by the jury, leaving no issue of law to be resolved by this Court.

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* While the jury found that petitioner had converted the plants, it awarded no additional damages for this tort (A. 181a) since it granted respondent the full amount of the unpaid purchase price less the "backcharges".

I.

Petitioner's contentions concerning the dismissal by the District Court of its claims for consequential damages are moot. The jury found substantial performance and no negligence on the part of respondent. In any event, petitioner's arguments have no merit.

In the first two points of its Petition, petitioner argues that for various reasons the District Court improperly dismissed its claim for consequential damages (alleged loss of profits). Petitioner singularly ignores the fact that the jury found that respondent had substantially performed each contract and was not guilty of negligence. The jury thus necessarily found there was no basis for an award of damages, either direct or consequential. The questions sought to be raised by petitioner are therefore moot and present no question of law for this Court. In any event, petitioner's arguments have no merit.

Prior to the trial, respondent moved for partial summary judgment to dismiss certain causes of action in the amended complaint which sought to recover consequential damages in the form of alleged lost profits. This was based on the provisions of each conditional sales contract which provided that respondent "shall in no event have any liability for loss of profits, losses caused by shut-downs or delays or other similar or dissimilar consequential damages" (V. 17). It is conceded that the contracts are governed by the provisions of the Uniform Commercial Code ("UCC") in effect in both Ohio, the law of which was held by the District Court to govern, and New York.

Section 2-719 of the UCC reads in full as follows:

"Contractual Modification or Limitation of Remedy.

(1) Subject to the provisions of sub-sections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

District Judge Frankel denied the motion on the ground that further facts should be developed at the trial relating to the "unconscionability" issue (Pet. App. A 42a-43a). He pointed out, however, that exclusion of consequential damages under Section 2-719(3) was separate and distinct from the question of whether an exclusive remedy fails of its purpose under Section 2-719(2) (Pet. App. A 41a-42a).

Respondent renewed its motion at the outset of the trial and the District Court reserved decision (A. 37a-39a). When the facts concerning the circumstances surrounding

the execution of the contracts had been fully developed, the District Court, without the presence of the jury, inserted in the transcript its memorandum decision granting respondent's motion to dismiss all claims for alleged loss of profits (Pet. App. A. 33a-37a).

Petitioner claims that the limited remedy of repair and replacement failed of its essential purpose within the meaning of Section 2-719(2) of the UCC and that thus the exclusion of consequential damages must fall (Petition, p. 12). In support of this proposition petitioner relies on *Jones & McKnight Corp.* v. *Birdsboro Corp.*, 320 F. Supp. 39 (N.D. Ill. 1970) and *Adams* v. *J. I. Case Company*, 125 Ill. App.2d 388, 261 N.E.2d 1 (1970). Those cases do not touch the *factual* situation found by the jury to exist here. Both concerned motions, one for summary judgment *(Jones & McKnight)* and the other to dismiss the complaint *(Adams)*, where in each case the complaint alleged *wilful* or careless breach by the defendant (see 320 F. Supp. at 43; 125 Ill. App.2d at 402, 261 N.E.2d at [redacted] and in each case the court held that if such were proved the contract clause excluding consequential damages would be rendered nugatory. Here on the other hand the jury found that respondent substantially performed its contract obligations and was not negligent (Pet. App. A 5a, 7a).

Thus, under the facts as found, there is no occasion to decide whether the principle announced in *Jones & McKnight* and in *Adams* was correct, for the facts here found by the jury show that there was no wilful or careless breach by respondent. Quite the contrary—the jury found substantial performance and no negligence on the part of respondent.

Even if the case were otherwise, respondent submits that the plain wording of Section 2-719 of the UCC re-

quires a different construction than that adopted by the courts in those two cases. Section 2-719(1)(b) deals with exclusive *remedies*. Section 2-719(2) provides that if the exclusive remedy fails "of its essential purpose, *remedy* may be had as provided in the Act" (emphasis supplied). The exclusion of consequential *damages*, however, is separately covered by the equally prominent Section 2-719(3) and, as District Judge Frankel held, is not governed by the *remedy* provisions of Section 2-719(2) (Pet. App. A 41a-42a).

Suffice it to say that under the facts found by the jury in this action, the question of which of the two constructions is correct is not presented here.

There was no error committed by the District Court in upholding the bargained for contract provisions excluding consequential damages. In a commercial setting of this sort where both sides are represented by experienced businessmen, the courts have repeatedly upheld exclusions of consequential damages. *National Steel Corp.* v. *L. G. Wasson Coal Mining Corp.*, 338 F.2d 565 (7th Cir. 1964); *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864, 871 (E.D. Pa. 1966); *World Prods., Inc.* v. *Central Freight Serv., Inc.*, 222 F. Supp. 849 (D.N.J. 1963), *modified on other grounds* (but expressly affirmed on this ground), 342 F.2d 290 (3d Cir. 1965); *Moreira Constr. Co.* v. *Moretrench Corp.*, 97 N.J. Super. 391, 235 A.2d 211 (1967), *aff'd mem.*, 51 N.J. 405, 241 A.2d 236 (1968); *Eimco Corp.* v. *Lombardi*, 193 Pa. Super. 1, 162 A.2d 263 (1960); *see also*, 3 R. Duesenberg & L. King, *Sales & Bulk Transfers Under The U.C.C.* §7.03[2] (1969); 1 R. Anderson, *Uniform Commercial Code* 407 (2d ed. 1970).

Thus, the decision of the District Court, dismissing the claims for consequential damages (loss of profits), made

after the circumstances of the negotiations for and the execution of the contracts had been fully developed at the trial, was in all respects correct.

In its Point II (Petition, pp. 17-23) petitioner attempts to show that the Trial Court in determining the issue of unconscionability without submission to the jury of the factual issues "common to equitable and legal claims for relief" thereby collaterally estopped the jury from determining those issues. Petitioner asserts that the Trial Court violated the principles established by this Court in three cases.* Petitioner's reliance on these cases is misplaced. In the first place the Trial Court determined the issue of unconscionability without the presence of the jury, as we have seen (*supra*, pp. 12-13). Secondly the determination by the Trial Court that the exclusion of consequential damages was not unconscionable did not work to prevent the issues as to petitioner's legal claims from being determined by the jury. These claims—alleged breach of contract, breach of warranty and negligence—were properly presented to the jury (T. 2963-3003) and the jury determined such legal claims adversely to petitioner's contentions. The jury found substantial performance and no negligence on the part of respondent (Pet. App. A 28a, 30a). Nothing determined by the Trial Court with respect to the issue of unconscionability worked any estoppel, collateral or otherwise, with respect to petitioner's legal claims and, at the trial, counsel for petitioner stated that he recognized this to be the fact (T. 1906-1912). As the Court of Appeals stated (Pet. App. A 3a), in the appeal to that Court the

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* *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); *Ross* v. *Bernhard*, 396 U.S. 531 (1970).

"plaintiff [petitioner] does not assert error in the charge" * and therefore petitioner's criticism of the Trial Court's charge on substantial performance (Petition, p. 22) is untenable. Moreover, examination of the Trial Court's charge on this point will reveal that it was in all respects clear and adequate (A. 147a).

Respondent respectfully submits, therefore, that the entire argument of petitioner in its Point II is misdirected.

Section 2-302 of the UCC (Pet. App. B 44a), in accordance with well established principles of equity, provides that the court should determine whether or not any clause of a contract is "unconscionable *at the time it was made*" (emphasis supplied). The facts concerning the circumstances surrounding the execution of the contracts in question were uncontroverted. The evidence, without contradiction, showed that the principal officers of petitioner who were present and who signed the contracts were experienced businessmen; that there was hard bargaining between the parties on the day the contracts were executed, lasting the better part of one whole day; that there was no overreaching on the part of respondent; and that petitioner's officers had read and were well aware of the provisions limiting liability in each contract (A. 52a-58a, 61a, 70a; Pet. App. A 16a, n. 9).

Thus it was on the basis of the *uncontroverted* facts that the Court below determined that the Trial Court had properly upheld the contractual exclusions of consequential damages as not being unconscionable (Pet. App. A 13a-16a; 16a, n. 9).

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* In response to a specific question from the Court of Appeals on oral argument, counsel for petitioner stated that no claim of error in the Trial Court's charge was being pressed.

Petitioner concedes that "the ultimate determination of 'unconscionability'" need not have been submitted to the jury (Petition, p. 19). That being so, and since petitioner received jury consideration of the issues relating to all of its legal claims under a charge which presented to the jury "clearly and succinctly . . . all of the issues in the case" (Pet. App. A 3a), the contentions advanced by petitioner in its Point II are without either merit or substance.

II.

There was no irreconcilable conflict between the jury's answers to written interrogatories and its general verdict in favor of respondent in the sum of $226,000.

In its last point (Point III, Petition, pp. 24-32) petitioner contends that, viewed properly, the jury's answers to the written interrogatories require that the general verdict in respondent's favor be reduced to $66,000. Despite petitioner's efforts to convince this Court that questions of law are involved, analysis reveals that this matter concerns essentially a *factual* determination as to whether the answers to written interrogatories were in irreconcilable conflict with the general verdict. That question of fact was determined adversely to petitioner's position by both the Trial Court and the Court of Appeals. Certainly it presents no meritorious point of law for review by this Court.

In its general verdict the jury found that the petitioner was indebted to respondent in the net amount of $226,000 (Pet. App. A 4a-5a). In its answers to the special interrogatories the jury found that respondent had substantially performed the contracts; that there was a "balance due" on the stipulated purchase price amounting to $226,000; that

respondent was indebted to petitioner for "backcharges" in the amount of $160,000; and that respondent had not replaced "every" defective or non-conforming part (Pet. App. A 5a-7a). Petitioner would have this Court ignore the first of the "Questions in the nature of a general verdict" in which the jury found that petitioner owed respondent the net sum of $226,000, by claiming that the procedure adopted was a "special verdict" under Rule 49(a) rather than a general verdict accompanied by answers to written interrogatories under Rule 49(b). In other words, according to petitioner, only the answers to the "special interrogatories" should be considered and these should be so construed as to arrive at the lesser general verdict. Both the Trial Court and the Court of Appeals rejected this tenuous argument (Pet. App. A 7a-13a, 21a-22a). It is obvious that the Trial Court adopted the Rule 49(b) procedure as the format of its written questions clearly shows (Pet. App. A 27a-33a). Moreover, it is settled that "[t]he form of interrogatories submitted to the jury [under Rule 49(b)] is within the discretion of the trial judge." *Tennessee Consolidated Coal Co.* v. *United Mine Workers of America,* 416 F.2d 1192, 1200 (6th Cir. 1969), *cert. denied,* 397 U.S. 964 (1970).

Petitioner also seeks to take the Court below to task for following its own decision in *Julien J. Studley, Inc.* v. *Gulf Oil Corp.,* 407 F.2d 521 (2d Cir. 1969), where it was held that a court should avoid the finding of inconsistency in the jury's verdict "by exegesis if necessary". The words quoted are taken verbatim from this Court's opinion in *Gallick* v. *Baltimore & Ohio R.R.,* 372 U.S. 108, 119 (1963). While *Gallick* involved a special verdict under a state statute, petitioner offers no reason why the same principle should not apply to a Rule 49(b) verdict. In point

of fact, this Court in *Gallick* cited in support of its holding *Arnold* v. *Panhandle & Santa Fe Ry.*, 353 U.S. 360 (1957), where there was a general verdict based on answers to special interrogatories under Texas state procedure which was in all respects similar to that provided by Rule 49(b).

In any event, in making its factual determination as to lack of inconsistency the Court of Appeals here was not compelled to resort to "exegesis". It found that "there are no answers to interrogatories which are inconsistent either with the verdict or with each other so as to justify an amendment of the jury's verdict" (Pet. App. A 11a). It nevertheless carefully reviewed the record to see whether the uncontradicted evidence established, as petitioner claimed, that there were damages for breach of warranty amounting to $160,000 which should have been deducted, in addition to the "backcharges" in the same amount, from the stipulated unpaid purchase price (Pet. App. A 11a-12a). It concluded that there was no error of law in the jury's failure to find damages for any possible breach of warranties and that therefore the Trial Court's decision that there was no inconsistency between the jury's findings and its general verdict was correct (Pet. App. A 13a).

Summary

Under the facts of this case, there are no meritorious questions of law for this Court's determination. Furthermore, since the proceedings in the Court of Appeals were a nullity for lack of jurisdiction, there is no action of that Court to be reviewed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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